91-1817

FILED
MAY 8 1992
OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

OCTOBER TERM, 1992

EDMUND M. HURLEY AND
CHARLES R. BURNETT,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALBERT F. CULLEN, JR.
Counsel of Record
CULLEN & BUTTERS
One Beacon Street
Boston, Massachusetts 02108
(617) 367-2600

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED FOR REVIEW

1. Is the decision rendered in this case by the United States Court of Appeals for the First Circuit in conflict with the decision of the United States Court of Appeals for the Sixth Circuit rendered in United States v. Minarik, 875 F.2d. 1186 (1989)?

2. Is the decision rendered in this case by the United States Court of Appeals for the First Circuit in conflict with the decision of the United States Court of Appeals for the Eleventh Circuit rendered in United States v. Pritchett, 908 F.2d. 816 (1990)?

3. Is the "defraud" clause of 18 U.S.C. § 371 so vague and elastic that it violates the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

4. Is the failure of the Government

to include in Count One of the indictment alleging a violation of 18 U.S.C. § 371, conspiracy to defraud the IRS, a reference to 18 U.S.C. 1956, the money laundering statute, of which petitioners were accused by the Government of violating, 35 times during its opening statement and 23 times during its closing statement, cause for reversal of petitioners' convictions as being in violation of the Fifth and Sixth Amendments to the Constitution of the United States of America?

Table of Contents

REFERENCE TO COURT OPINIONS 1

GROUNDS FOR JURISDICTION.....2

CONSTITUTIONAL PROVISIONS AND STATUTES...4

STATEMENT OF THE CASE.....5

ARGUMENT.....18

I. THE DECISION IN THIS CASE RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT IS IN CONFLICT WITH UNITED STATES V. MINARIK, 875 F.2d 1186 (1989) RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.....18

II. THE DECISION IN THIS CASE RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT IS IN CONFLICT WITH UNITED STATES V. PRITCHETT, 908 F.2d 816 (1990) RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.....30

III. THE DEFRAUD CLAUSE OF 18 U.S.C. § 371 IS SO VAGUE AND ELASTIC THAT IT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.....36

IV. THE FAILURE OF THE GOVERNMENT TO INCLUDE IN COUNT ONE OF THE INDICTMENT ALLEGING A VIOLATION OF 18 U.S.C. § 371, CONSPIRACY TO DEFRAUD THE IRS, A REFERENCE TO 18 U.S.C. § 1956, THE MONEY LAUNDERING STATUTE, OF WHICH PETITIONERS WERE ACCUSED BY THE GOVERNMENT OF VIOLATING, 35 TIMES DURING ITS OPENING STATEMENT AND 23 TIMES DURING ITS CLOSING STATEMENT IS CAUSE FOR REVERSAL OF PETITIONERS' CONVICTIONS AS

BEING IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.....45

CONCLUSION.....53

APPENDIX.....**
OPINION OF COURT OF APPEALS FOR THE FIRST CIRCUIT.....A-1
DENIAL OF PETITION FOR REHEARING.A-36
DENIAL OF MOTION TO STAY MANDATE.A-37
DENIAL OF MOTION TO RECALL MANDATE.....A-38

TABLE OF AUTHORITIES

CASES

PAGES(S)

Connally v. General Construction Co., 269 U.S. 385 (1926).....41, 42

Dennis v. United States, 384 U.S. 855, (1966).....28

Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969).....48, 49

Hamling v. United States, 418 U.S. 87, (1974).....50

Hedderly v. United States, 193 F. 561 (1912).....46

Ingram v. United States, 360 U.S. 672 (1959).....33

Jordan v. DeGeorge, 341 U.S. 223 (1951).42

Musser v. Utah, 333 U.S. 95 (1948).....42

Pettibone v. United States, 148 U.S. 197, (1893).....46

Sitrone v. United States, 361 U.S. 212..49

Tanner v. United States, 483 U.S. 107 (1987).....20

Tyner v. United States, 23 App.Dec. 224 (D.C. Cir. 1904).....37

United States v. Allard, 864 F.2d 248 (1st Cir. 1989).....50

United States v. Browning, 723 F.2d 1544, (11th Cir. 1984).....33, 34, 45, 48

United States v. Cawthon, 125 F.Supp. 419 (1954).....46

United States v. D'Amato, 722 F.Supp. 221, (E.D. Pa. 1989).....21

United States v. Dunn, 758 F.2d 30 (1st. Cir. 1985).....48, 49

United States v. Enstam, 622 F.2d. 857 (5th Cir. 1980).....33, 34

United States v. Gradwell, 243 U.S. 476 (1917).....36, 38

United States v. Hammerschmidt, 265 U.S. 182 (1924).....20

United States v. Harriss, 347 U.S. 612 (1954).....42

United States v. Johnson, 577 F.2d. 1304 (5th Cir. 1978).....9

United States v. Maling, 737 F.Supp. 684 (D.Mass. 1990).....49

United States v. Minarik, 875 F.2d 1186 (1989).....18, 19, 20, 21, 22, 28, 29, 52

United States v. Mollica, 849 F.2d 723 (2nd. Cir. 1988).....49

United States v. Olmstead, 5 F.2d. 712 (1925).....46

United States v. Pritchett, 908 F.2d 816 (1990).....30, 31, 33, 34, 35, 48, 53

United States v. Reynolds, 919 F.2d 435 (1990).....43

United States v. Serino, 835 F.2d 924 (1st. Cir. 1987).....50

United States v. Sullivan, 274 U.S. 259 (1927).....9

United States v. Tarvers, 833 F.2d 1068 (1st. Cir. 1987).....32, 33, 39, 40, 45

STATUTES

18 U.S.C. §371.....5, 18, 19, 21, 22, 28, 29, 32, 35, 36, 41, 43, 44, 45, 46, 48, 52, 53, 54

18 U.S.C. §1952(a)(1).....5

18 U.S.C. §1956.....19, 20, 21, 22, 23, 29, 44, 45, 47, 48, 54

18 U.S.C. §1962(c), (d).....5

18 U.S.C. §7201.....20

26 U.S.C. §7206(4).....18

28 U.S.C. §1254(1).....3

RULES

F.R.A.P. 40.....2

F.R.A.P. 41(b).....2

Supreme Court Rule 10.1(a).....3

Supreme Court Rule 10.1(c).....3

F.R.Crim.P. 6(f).....47

F.R.Crim.P. 7(c)(1).....49, 50

Constitution of the United States

Fifth Amendment.....9, 10, 42, 44, 47, 49, 50, 52, 53, 54

Sixth Amendment.....45, 49, 52, 54

Fourteenth Amendment.....42

OTHER AUTHORITIES **PAGE**

The Story of My Life, Clarence Darrow (1932).....36

Conspiracy to Defraud the United States, Abraham S. Goldstein, 68 Yale L.J. 405 (1959).....37, 38, 39, 40, 41, 42, 43, 53

Prosecutions For Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid, Steven Duke, 76 Yale L.J. 1 (1966) 39

The Mistake of Law As A Defense, Ekkehart Muller-Rappard, 36 Temple Law Quarterly 275 (1963).....40

REFERENCE TO COURT OPINIONS

The opinion by the United States Court of Appeals for the First Circuit was entered February 14, 1992 bearing numbers 90-1690 and 90-1693. (Appendix, A-1 through A-35).

GROUNDS FOR JURISDICTION

1. Judgments of conviction were entered in the United States District for the District of Massachusetts on July 9, 1990.

2. The United States Court of Appeals For the First Circuit entered judgment in this case on February 14, 1992.

3. Petition for Rehearing under Rule 40 of the Federal Rules of Appellate Procedure was denied by the United States Court of Appeals For the First Circuit on March 11, 1992.

4. Motion to Stay Mandate filed by petitioners pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure was denied by the United States Court of Appeals For the First Circuit on March 19, 1992.

5. Jurisdiction is conferred on this

Court to review the judgment in question by 28 U.S.C. § 1254(1), Supreme Court Rule 10.1(a), United States Court of Appeals has rendered a decision in conflict with the decisions of other United States Court of Appeals on the same matters, and Supreme Court Rule 10.1(c), a United States Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

Articles in addition to, and Amendment of, the Constitution of the United States of America

Article [V]
(Included in Appendix at A-39)

Article [VI]
(Included in Appendix at A-39, A-40)

18 U.S.C. §371
Conspiracy to Commit Offense or to Defraud United States
(Included in Appendix at A-40, A-41)

18 U.S.C. §1956
Laundering of Monetary Instruments
(Included in Appendix at A-41 - 57)

Federal Rules of Criminal Procedure 6(f)
Finding and Return of Indictment
(Included in Appendix at A-57, A-58)

Federal Rules of Criminal Procedure 7(c)(1)
The Indictment and the Information
(Included in Appendix at A-58, A-59)

STATEMENT OF THE CASE

Petitioners Hurley and Burnett were named in an indictment dated March 23, 1989, along with five other individuals, charging all of them with conspiracy to defraud an agency of the United States, namely the Internal Revenue Service (IRS) in violation of 18 U.S.C. § 371 (Count One). Petitioners Hurley and Burnett also were charged with conspiracy to engage in racketeering, 18 U.S.C. § 1962(d) (Count Two), the substantive crime of racketeering, 18 U.S.C. § 1962(c) (Count Three), and use of interstate and foreign facilities in aid of racketeering, 18 U.S.C. § 1952 (a)(1).

There were 62 specific overt acts mentioned in the conspiracy to defraud of Count One and 103 acts of racketeering included in Count Two. The indictment consisted of 37 pages. The trial

commenced March 5, 1990 and the jury returned its verdict April 19, 1990, 29 trial days later.

The trial court, after the Government rested, granted motions for judgment of acquittal of petitioner Hurley on Counts 3 through 15 and of petitioner Burnett on Counts 3 through 13 and Count 15.

The jury acquitted Hurley on Count 2 and Burnett on Counts 2 and 14, but convicted both petitioners on Count One, conspiracy to defraud the IRS.

On July 9, 1990 petitioners were sentenced to two years imprisonment; Hurley to serve eight months, balance suspended with sixteen months probation; Burnett to serve six months, balance suspended with eighteen months probation. Both petitioners were fined $10,000.

FACTS

Three lawyers and a business adviser

of Salvatore Michael Caruana were the defendants who endured the six-week trial in this matter during March and April, 1990. Two other named defendants, lawyers from Nassau, Bahamas, chose not to appear for trial. Caruana has been a fugitive since April 2, 1984. All seven named defendants were associated with Caruana (a named defendant) and/or the various companies he controlled or had interest in during the period of the alleged conspiracy, "October 31, 1978 and continuing until at least April 1987" (see Count One of the indictment).

Caruana earned his money by importing, distributing and selling marijuana during the years 1978 - 1981. Caruana declined to stand trial on April 2, 1984 to face the criminal implications of his avocation. Caruana also owned an air plane with which he did charter work,

owned an auto leasing company called Damon Leasing and had an interest in a hockey rink and pro shop. (Tr. 3-80, 7-28)

Caruana had hired Attorney Martin G. Weinberg of the law firm of Oteri and Wienberg with an office, during the relevant time, at Suite 528, Ten Post Office Square, Boston, MA, and CPA, Lee A. Heiler, Jr., (Suite 518, Ten Post Office Square, Boston, MA) (Tr. 7-22.) to prepare and file tax returns for the years 1978, 1979, 1980 and 1981, the years in which Caruana made millions from importing and distributing marijuana. Petitioner Hurley practiced law during the period of the alleged conspiracy at Suite 513, Ten Post Office Square, Boston, MA. Attorney Martin G. Weinberg, in October, 1979 informed the IRS that Caruana was under investigation by the F.B.I. and D.E.A. and was concerned with criminal forfeiture.

Based upon attorney Weinberg's advice, Caruana invoked his Fifth Amendment privilege; provided no information as to the source and/or amount of income to the IRS; and stated that he would provide the required information if the IRS agreed not to furnish it to other law enforcement agencies.

A letter signed by attorney Weinberg was filed for each of the years 1978 through 1981 with Caruana's tax returns which read in part as follows:

> "Legally, Mr. Caruana is aware of his tax-related responsibilities to file a 1978 tax return pursuant to 26 U.S.C. 6011. He is not a "tax protester" (see United States v. Johnson, 577 F.2d 1304 (5th Cir. 1971). He acknowledges that income that is illegally earned must be disclosed. (United States v. Sullivan, 274 U.S. 259, 263). He has no desire to impede any proper governmental effort to effectively collect taxes. On the contrary, Mr. Caruana has persistently avowed his unequivocal intent to conform to his tax-related obligations whenever that conformity does not waive or is not inconsistent with his Fifth

Amendment rights." (Ex. 2-18, 4 Tr. 118-125)

For each of the years 1978-1981 Caruana's tax lawyer, attorney Weinberg, filed similar letters and as the government's investigative efforts against Caruana intensified, he informed the IRS of the developments by letter (Exs. 2-18; H.1, 2, 3, 4 & 6). IRS did not know how to respond.

The IRS reaction was to reject the 1978 return and each return thereafter (4 Tr. - 156; Exs. 2.15-2.16). In November of 1980 the IRS undertook an extensive investigation of Caruana's tax affairs (4 Tr. 80). During the course of the investigation administrative summons were issued to Caruana's tax lawyer, Martin G. Weinberg and his accountant, Lee A. Heiler, Jr., both of whom refused to comply (4 Tr. 136). No action to enforce

the summons was initiated (4 Tr. 136). The investigation revealed the existence of an off-shore company as well as petitioner Hurley's involvement. These leads were not followed up. Petitioner Hurley was never contacted, subpoenaed, or informed of the investigation.

Apparently since the IRS had rejected the returns, Caruana's tax attorney, Martin G. Wienberg, decided it was futile to file any other return after 1982. Attorney Wienberg continued to represent Caruana for tax matters (7 Tr. 55); up until at least June of 1985 (Ex. 2-26).

There was no evidence that petitioners knew that Caruana was not paying his income taxes.

During the investigation Caruana told a government witness working at his home (15 Tr. 108) that he had a problem with the IRS for which he was placing money in escrow (15 Tr. 129).

On March 15, 1985 after Caruana became a fugitive the IRS issued a notice of deficiency in the amount of $4.3 million for the years 1978 and 1979 (Ex. 2-24, 25). A petition was filed in the Tax Court on behalf of Caruana by his tax attorney, Martin G. Weinberg, contesting the deficiency (Ex. 2-26). The deficiency was never paid. (Paragraph 11 of Count One of the indictment.)

Petitioner Hurley was retained by three Bahamian corporations (Atlas, International Premium Investments, Ltd. and Nereide Co.) to represent them in connection with loans to various persons and entities in Massachusetts, Maine, New Hampshire and the purchase of the Islander Hotel in the Bahamas.

It was later discovered, during the execution of search warrants in 1987 at five locations in Massachusetts and

Connecticut wherein Caruana had stored voluminous documents and computer files detailing his most intimate thoughts and extensive financial transactions spanning over twenty years, that these three companies, plus more, were owned and controlled by Caruana through bearer stock of Panamanian corporations.

None of the transactions involving petitioner Hurley which were elicited during the course of the six week trial were illegal in and of themselves. All Hurley's activities were done within the context of his acting as an attorney for either Caruana or the Bahamian Companies.

Petitioner Burnett also acted throughout the period in question as an attorney concerned with the purchase of real estate in Florida, accounting for the proceeds of such transactions, and securing the pay off of a mortgage on an

aircraft owned by Bar Harbor Airlines for a Bahamian and/or Panamanian corporation called Neon Tetra.

The Government introduced circumstantial evidence through a convicted drug dealer, in the witness protection program, Arnold Katz who testified to shorten his 30 year sentence to 5 1/2 months, to show that petitioner Hurley was aware of Mike Caruana's importation and sale of marijuana. (f.n. 4, A-20) The allegation that petitioners were involved in the proceeds of unlawful sales of controlled substances, namely marijuana, was essential to Counts Two through Fifteen of the indictment, but not Count One.

For the purposes of Count One, the money which petitioners dealt with could have been derived from lawful activity. The Government's burden under 18 U.S.C. §

371 required only proof that petitioners entered into an agreement to defraud the IRS.

During the opening statement to the jury on March 6, 1990, the government mentioned the term "money laundering" thirty five (35) times. (Tr. 2-6 through 2-23.) In the closing argument on April 11, 1990 the government referred to "money laundering" a total of twenty three (23) times. (Tr. 24-18 through 24-74).

On the seventeenth day of trial, the government was trying to introduce evidence of an alleged act of extortion in support of Count One, conspiracy to defraud the IRS. The following dialogue occurred at the bench:

> THE COURT (Harrington, J.): The offense occurred in 1982. (All counsel talking at once.)
>
> THE COURT : Here's the thing: I don't care. The point is if you charged him with extortion, the statute would have run. You got him

here on a conspiracy, on the most wide conspiracy in the world, a 371 conspiracy, and you're trying to encompass an extortion act.

MR. ULLMANN: Judge, if this case isn't money laundering --

THE COURT: It may be money laundering, but that's not what he was charged with.
He is not charged with money laundering. I will read the statute.

MR. ULLMANN: Right. But the first --

THE COURT: I don't want to hear money laundering. I want to hear what he was charged with. There was no crime of money laundering when this indictment came down. (Tr. 17-182, 183)

Again on the 23rd day of trial, the court, Harrington, J. made another statement at a bench conference concerning his attitude toward the term "money laundering".

THE COURT: I don't want to hear the term "money laundering". The money laundering statute went into effect in 1986. The phrase does not help me. (Tr. 23-84)

During the final argument by the Government, reference to "money laundering" was made twenty-three times. Tr. 24-18 through 24-74. When a motion for mistrial was made by defense counsel, based on the extensive use of the phrase "money laundering", the District Court, Harrington, J., denied it:

> Mr. Cullen: Your Honor, I would like to move for a mistrial based on the closing statements. Mr. Saylor continually throughout his closing referred to this as a "money laundering" case. Your Honor has indicated to the government throughout that, in fact it was not a money laundering case. It's a conspiracy to impede and obstruct the Internal Revenue Service.
>
> Secondly I made an erroneous --
>
> The Court: This one I'm going to deny on this ground: Although technically as a matter of law certain statues have been alleged to have been violated, and is common parlance in an argument to the jury, which is not evidence, money laundering is what this case is about. So I think it was proper.
>
> Tr. 24-76.

I ARGUMENT

THE DECISION IN THIS CASE RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT IS IN CONFLICT WITH UNITED STATES v. MINARIK, 875 F.2d 1186 (1989) RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Minarik holds that:

> "[T]he 'offense' and 'defraud' clauses [of 18 U.S.C. § 371] as applied to the facts of this case are mutually exclusive, and the facts proved constitute only a conspiracy under the offense clause to violate 26 U.S.C. § 7206(4)..." Minarik, supra, at 1187.

The Sixth Circuit in Minarik on page 1196 concedes that:

> "§ 7206(4), by its provision criminalizing concealment of property upon which levy is authorized, does not oust other statutes criminalizing tax evasion.
>
> But where the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, we hold that a

> Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause. The conspiracy is still an indictable offense under the first clause of § 371. But compliance with our rule today will mean that prosecutors and courts are required to determine and acknowledge exactly what the alleged crime is. They may not allow the facts to define the crime through hindsight after the case is over." United States v. Minarik, supra at 1196.

The government in prosecuting the case at bar made no attempt to couch the description of Count One in terms of conspiracy to evade taxes. The government used the term "money laundering" to describe Count One which was the crime all seven defendants were in fact accused of committing. However, the government, for whatever reason, chose not to proceed under the offense clause which would have required inclusion of the money laundering statute, 18 U.S.C. § 1956.

As was stated in Minarik:

> "Because the reach of the defraud clause in unclear, the Hammerschmidt [265 U.S. 182, 188, 44 S.Ct. 511, 512 68 L.Ed. 968(1924)] principle should be, and has been, strictly applied: `ambiguity concerning the ambit' of the defraud clause `should be resolved in favor of lenity'. Tanner v. United States, 107 S.Ct. at 2753." United States v. Minarik, supra, at 1191.

The money laundering statute, 18 U.S.C. § 1956 specifically refers to the same statute Minarik states should have been used in the offense clause, i.e. 26 U.S.C. § 7206 and further refers to 26 U.S.C. § 7201 which is exactly what the government sought to prove the conspiracy in the case at bar was all about, i.e. an attempt "in any manner to evade or defeat any tax imposed by this title or the payment thereof ---"

In Minarik, supra, at 1191:

> "The government has either overlooked or chosen to ignore this criminal statute prohibiting

concealment of assets from the IRS."

In the case at bar, the government has chosen to ignore the money laundering statute 18 U.S.C § 1956 only in pleading its case, but not in arguing its case.

The confusion found in United States v. Minarik, supra at 1190 was also found in the case at bar when the government proceeded against petitioners (based on identical overt acts) sounding in racketeering, conspiracy to racketeer, foreign travel in aid of racketeering, conspiracy to defraud the IRS, money laundering and extortion. The failure of the government to specify the last two crimes in the offense clause of 18 U.S.C. 371 generated unacceptable confusion. United States v. Minarik, supra at 1190.

In United States v. D'Amato, 722 F.Supp. 221, 225 (E.D. Pa 1989), in

footnote 3, the court interpreted the holding in Minarik as follows:

> "The court held that Congress' use of the disjunctive in the statute [18 U.S.C. 371] meant that defendants could not be accused of conspiring to defraud, but then convicted of conspiring to commit specific offenses against the government. 875 F.2d at 1193-94."

Petitioners submit that they were accused of conspiring to defraud the IRS by impeding the collection of taxes but convicted of conspiracy to launder money 18 U.S.C. 1956, under the "offense" clause of § 371. Contrary to what the District Court trial judge said at the trial, "There was no crime of money laundering when this indictment came down.", Tr. 17-183, money laundering was a crime on March 23, 1989 (the date of the indictment). 18 U.S.C. § 1956, the Money Laundering Control Act of 1986 became effective as of October 27, 1986, almost three years

before the indictment came down. Moreover 18 U.S.C. § 1956 was effective during the period of the alleged conspiracy which, continued until "at least April 1987" according to Count One of the indictment. The checks of Fairway Petroleum Inc., (a Michigan oil drilling company) made payable to D & M Trust mailed from Boston, Massachusetts to Nassau, Bahamas by petitioner Hurley (being overt act number 40 of Count One, acts of racketeering 44 through 75 of Count Two, and Counts Four through Fifteen) continued to be mailed to Nassau with the government's knowledge up to at least May 1988. (Ex. 12.20)

The United States Court of Appeals for the First Circuit belabors the point of petitioner Hurley being involved in a transaction in which Caruana gave a convicted drug trafficker $100,000 in cash in exchange for a one percent interest in

a Michigan oil and gas lease" (f.n. 5, A-22). The opinion fails to mention that the convicted drug trafficker was "the most decorated pilot to come out of the Viet Nam War", having flown over 1100 missions with 1500 hours of trigger time [time when he was either firing or being fired upon], and who accumulated more than 55 medals including two Bronze Stars and two Distinguished Flying Crosses. (Tr. 19-3) Neither did the First Circuit opinion mention that the checks from Michigan were addressed to 10 Post Office Square, Suite 528 (Ex. 12.18, Tr. 19-30), the law office of Oteri & Weinberg, or that the exchange of $100,000 occurred the same date as the execution of a promissory note in the amount $100,000 on December 1, 1978 (Tr. 19-13), one month before petitioner Hurley moved into his office, Suite 513 at 10 Post Office Square. (Tr. 23-43) In fact

petitioner Hurley's name was stricken from overt act numbered 5 of Count One which referred to the transfer of $100,000.

Footnote 4 on page 12 of the opinion in this case (A-20) states that "Katz spent approximately five and one half months in jail." A more significant fact concerning Katz is that he was sentenced to 30 years before he agreed to "cooperate". A close look at the transcript of Katz's testimony shows that defendant Hurley didn't understand what Katz was talking about and the conversation was confusing (A. Katz tr.31). Nothing came of that conversation. The brown paper bag containing $25,000.00 was a figment of Katz's imagination as was the opinion that Hurley was a participant in that conversation between Caruana and Katz. (A. Katz Tr.39). No foreign corporation was set up by defendant Hurley. Katz

established Bahamian corporations through an attorney he was referred to by attorney Weinberg (7 Tr. 22,31).

This is the only testimony on which, conceivably, the government could rely to show knowledge on the part of Hurley. It is insufficient to show knowledge of Caruana's drug smuggling ventures, even if one believes Katz that Hurley discussed the establishment of the Bahamian companies. Caruana's comments may or may not have been heard by Hurley but they are meaningless. He obtained receipts or, as a loan with Cardelli, obtained and recorded mortgages.

Hurley's involvement with cash was always documented. Also, Caruana held himself out as being in the gold business which apparently was a legitimate business. The largest single cash transaction involving Hurley was the delivery of cash

for the purchase of the Islander Hotel. The transaction was in cash at the request of the purchaser, not Caruana. Cash transactions in this context are not evidence of drug dealing.

Burnett did not know Caruana until late 1982 well after the smuggling ventures ended. There is not a scintilla of evidence to show that Burnett had any knowledge that Caruana had made his money in drug ventures and was trying to hide it. There is absolutely no evidence that Burnett was involved in the establishment of the Bahamian companies or could know that they were a conduit for the investment of drug money. There is no evidence Burnett knew Caruana had unpaid tax obligations.

The government recognized the fatal flaw in its case and attempted to "bootstrap" Burnett into this conspiracy

by showing he visited with Caruana when Caruana was under indictment. There was no showing, however, that Burnett knew Caruana was under indictment for drug smuggling. There is no evidence in the record from which a rational trier of fact could find otherwise.

Minarik, supra, at 1192 quotes Dennis v. United States, 384 U.S. 855, 860, 86 S.Ct. 1840, 1843, 16 L.Ed.2d 973 (1966):

> "[I]ndictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable."

Based on the 58 separate oral accusations by the government of "money laundering" in opening and closing statements, the offense and defraud clauses of 18 U.S.C. § 371, as applied to the facts of the case at bar, are mutually

exclusive, and the facts proved constitute only a conspiracy under the offense clause to violate 18 U.S.C. § 1956.

I Conclusion

Thus this case from the United States Court of Appeals for the First Circuit is in conflict with the case of United States v. Minarik, supra, from the Sixth Circuit. The Supreme Court of the United States should grant this petition for writ of certiorari to resolve this conflict and avoid the inherent ambiguity and vagueness associated with 18 U.S.C. § 371, the "conspiracy law" of the United States, when the government chooses to utilize the elastic "defraud clause" as opposed to the precise "offense clause" to the detriment of petitioners' rights.

II ARGUMENT

THE DECISION IN THIS CASE RENDERED BY

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT IS IN CONFLICT WITH UNITED STATES V. PRITCHETT, 908 F.2d 816 (1990) RENDERED BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

In the case of United States v. Pritchett, supra, at 821, the government produced evidence to show that two defendants,

> "David and Mark, participated in concealing [the defendant drug dealer's] ownership in various assets, including his interest in the unknown contents of safe deposit boxes owned by Mark . . . to prove that David knew that [the defendant drug dealer's] money was earned contemporaneously through drug sales, rather than coming from a `cash hoard' from previous year's income."
>
> "David knew that [the defendant drug dealer] was earning income from selling cocaine, and he knew that [the defendant drug dealer] was earning income from selling cocaine." United States v. Pritchett, supra, at 820.
>
> "However, the government presented no independent evidence of David's and Mark's knowledge of [the

> defendant drug dealer's] tax liability and that [the defendant drug dealer's] motivation for hiding his income and ownership interests was to evade income taxes." United States v. Pritchett, supra, at 821.

The Pritchett court stated that

> "David's and Mark's efforts at concealing [the defendant drug dealer's] source of income and ownership interests are not reasonably explainable only in terms of motivation to evade taxes." Pritchett, supra, at 821. "Other than offering evidence that [the defendant drug dealer] did not file tax returns in the years that he was earning money from the drug sales, the government offered no independent proof that [the defendant drug dealer] was motivated by a desire to evade income taxes. Therefore we find the evidence presented at their trials was insufficient to convict either David or Mark of conspiracy to evade income taxes because nothing in the evidence indicates that either man knew that [the defendant drug dealer] was not filing tax returns and did not intend to pay his federal income taxes." Pritchett, supra, at 821.

In the case at bar, the First Circuit Court of Appeals held "the government did

not need to show direct evidence of tax motivation." A-17

> "If the government presented sufficient evidence to demonstrate that Hurley and Burnett knew their transactions for Caruana [the defendant drug dealer] involved illegal drug proceeds, the jury would have had a circumstantial basis for inferring that defendants -- both sophisticated attorneys -- understood that Caruana was conducting business in an unorthodox manner in order to conceal his criminal conduct and avoid paying taxes on his profits. [citation omitted] [A-18] Such evidence additionally would permit the jury to find that, in performing the legal work necessary to hide Caruana's drug-derived income from the government, defendants were willing participants in the tax evasion scheme. This would be enough to support their convictions for conspiracy to impede the IRS under § 371. See Tarvers, 833 F.2d at 1075." A-19,20

The citation of United States v. Tarvers, 833 F.2d. 1068 (1st Cir. 1987) is revealing in following the faulty reasoning of the First Circuit. Tarvers specifically relies upon another Eleventh Circuit case, for the following holding:

> "The act of "laundering" money derived as profits from drug trafficking itself has been held to constitute impeding the IRS in its ability to collect taxes. United States v. Browning, 723 F.2d. 1544, 1546 (11th Cir. 1984)." United States v. Tarvers, supra, at 1075.

In Pritchett the Eleventh Circuit points out that the government argued that the precedent in United States v. Browning, supra

> "was sufficient to convict both men [David and Mark] of conspiring with [the defendant drug dealer] to evade [the defendant drug dealer's] income taxes. In both these cases [United States v. Enstam, 622 F.2d. 857 (5th Cir. 1980), cert. denied, 450 U.S. 912, 101 S.Ct. 1351, 67 L.Ed. 2d 336 (1981) and United States v. Browning,[supra], the court upheld the defendants' conviction despite the fact that no direct evidence of their intent to avoid income taxes was presented. Nevertheless, both Enstam and Browning are consistent with Ingram [v. United States, 360 U.S. 672, 79 S.Ct. 1314, 3L.Ed.2d 1503 (1959)], in that the government offered independent evidence of an intent to avoid income taxes." United States v. Pritchett, supra, at 821. (emphasis supplied).

In the Pritchett case, the Eleventh Circuit recognized the two prong requirement in the Browning case, i.e. "the complementary objectives of [1] laundering illegally obtained money . . . and [2] impairing the IRS . . ." United States v. Browning, supra, at 1546.

In the Pritchett case, the court found

> "no similar independent evidence of an intent to evade income taxes. No statements of co-conspirators manifesting a desire to avoid taxes were presented. Furthermore, [the defendant drug dealer's] habit of putting assets he purchased in someone else's name and his almost exclusive use of cash do not by themselves serve to disguise the money was non-taxable income. Thus the present case contains no independent evidence of a shared intent to avoid [the defendant drug dealer's] income taxes like that presented in Enstam and Browning." United States v. Pritchett, supra, at 822.

The First Circuit findings that the government did not need to show "direct evidence of tax motivation" (A-17), "jury

had circumstantial basis for inferring . . ." (A-18), "permitted jury to conclude" (A-32), are all inadequate standards to apply in determining guilt in a so called "multi-objective conspiracy."

II Conclusion

Such a contrary attitude toward the necessity of proving both prongs of the object of the conspiracy to defraud the IRS demands that this apparent conflict between this case and United State v. Pritchett be resolved in the Supreme Court.

III THE DEFRAUD CLAUSE OF 18 U.S.C. § 371 IS SO VAGUE AND ELASTIC THAT IT VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

> "If there are still any citizens interested in protecting human liberty, let them study the conspiracy law of the United States".

Clarence Darrow, The Story of My Life 64 (1932).

18 U.S.C. § 371, the conspiracy law of the United States to which the eminent trial attorney Clarence Darrow referred in his autobiography provides (as applied in this case):

> "If two or more persons conspire . . . to defraud . . . [the IRS] in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Petitioners were convicted under said statute on April 19, 1990 and thereafter sentenced.

> 18 U.S.C. § 371 "first appeared as § 30 of `An Act to amend existing laws relating to Internal Revenue, and for other purposes,' enacted on March 2, 1867, 14 Stat. 471, and except for an omitted not relevant provision, the section has continued from that time to this, in almost precisely its present form." United States v. Gradwell, 243 U.S. 476 at 481 (1917).
>
> "When the statute [18 U.S.C. 371]

was first adopted in 1867, the federal criminal code was in a primitive state." Abraham S. Goldstein, Conspiracy to Defraud the United States 68 Yale L.J. 405, 440 (1959).

"In Tyner v. United States, 23 App. Dec. 324 (D.C. Cir. 1904) the word `defraud' was completely severed from the common law of fraud or cheats. Under the guise of applying a rule of construction `that a statute which is made for the good of the public ought, although it be penal, to receive an equitable construction' the court announced that the word `defraud' was to be read in its equitable sense.' Tyner, supra at 362." Goldstein, supra, at 422.

"It was, however, completely out of tune with one of the principal objectives of the criminal law - affording potential offenders notice, in advance of action, of what is prohibited and what is permitted. Such imprecision necessarily allows the prosecutor more easily than in the past to reach conduct, which, in his view, threatened governmental authority. It thus introduced under the cloak of words of seemingly settled meaning an evolutionary conception of the law of crime clearly at odds with the old saw that federal crime is clearly defined by the legislature and that there are no judge made `common law offenses against the United States'". Goldstein, supra at 424.

> "Whenever misconduct in some way directed at the Government fell short of a specific offense category but seemed nevertheless deserving of punishment, or wherever problems of proof made invocation of the offense portion of the statute questionable, the resourceful prosecutors could turn to this crime of many meanings and of seemingly infinite elasticity." Goldstein, supra at 428.
>
> "There are no common-law offenses against the United States --- that before a man can be punished as a criminal under the federal law his case must be `plainly and unmistakenly' within the provisions of some statute ---." United States v. Gradwell, 243 U.S. 476 at 485 (1917), Goldstein, supra at 428.

Under Count One of the indictment in the case at bar, the prosecution chose to proceed under the vague and elastic "defraud clause" to accuse petitioners of conspiracy to defraud by money laundering, extortion and tax evasion, inter alia.

But "vagueness of definition . . . is a significant feature of criminal tax

sanctions." Steven Duke, Prosecutions For Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid, 76 Yale L.J. 1, 3 (1966). "Vagueness may also enhance the deterrent effect of a sanction in that uncertainty may scare away many who otherwise should press close to the line of legality. But see Goldstein, [supra at 443 - 447]" Duke, supra at 3.

As the government stated to the District Court on day seventeen of the trial at a bench conference:

> MR. ULLMANN: Your Honor, the whole point of this money laundering case, which we admit we're going under the Taverse (ph.) precedent-- [United States v. Tarvers, 833 F.2d. 1068 (1st Cir. 1987)]
>
> THE COURT: You're not going under money laundering. You're going under willful.
>
> MR. ULLMANN: That's what Tarverse [Tarvers] is all about.
>
> THE COURT: Tarverse [Tarvers] is a lot different. In Tarverse

> [Tarvers] they were phony loans. They had involvement in a lot of deals. They had an insider who was testifying that the purpose was to deprive somebody of taxes. Tr. 17-180.

In the case at bar, there were no phony loans. Each was secured, collateralized and genuine.

> "Thus, the maxim that actus non facit reum nisi meus sit rea is maintained against the maxim that actus iudicat hominem. In other words, if the mental element of the conduct alleged to be a crime is proved to have been absent, the crime so defined has not been committed. The courts, therefore always refer to `corrupt purpose', a `wicked intent to do evil,' an `awareness of some wrong doing' or a `criminal mind'."

The Mistake of Law As A Defense, Ekkehart Muller-Rappard, 36 Temple Law Quarterly 275 (1963).

> "The denial of ignorance of law as a defense rests upon the premise that the state has discharged its obligation by drafting a clearly defined statute reasonably available to those who would heed its warning." Goldstein, supra at 445.

In the case at bar petitioners were

not given fair warning in 18 U.S.C. § 371 of the criminal nature of the acts they were alleged to have committed in conspiring to defraud the IRS. All the acts of petitioners were performed in the context of petitioners performing legal duties for clients. The tax implication of each transaction was not the responsibility of either petitioner, but rather of Caruana, his corporations, his tax attorney and his certified public accountant. Nothing in 18 U.S.C. § 371 mandates that petitioners should go about their legal functions with an awareness that their clients are evading taxes as opposed to avoiding them. That responsibility remains with the client.

> " `A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' Connally v. General Construction

> Co., 269 U.S. 385, 391 (1926). 'The doctrine that a criminal statute if sufficiently vague, violates the due process clause of the fifth or fourteenth amendment has been developed in a long line of cases.'" Connally, supra, U.S. v. Harriss, 347 U.S. 612, 617 (1954), Jordan v. DeGeorge, 341 U.S. 223, 230 (1951), Musser v. Utah, 333 U.S. 95, 96-97 (1948)." Goldstein, supra at page 440.
>
> "Legislation may run afoul of the Due Process clause because it fails to give adequate guidance to those who would be law abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused."
>
> Goldstein, supra at 441.

The phrase "defraud the US",

> "as interpreted by the Supreme Court, is too vague to be understood by the man of common intelligence".
> Goldstein, supra at 442.

The petitioners should not be deprived of their liberty and property without "due process of law" as guaranteed to them by the Fifth Amendment to the Constitution of the United States of America.

The "defraud" clause of 18 U.S.C. § 371 has been defended against challenges to its constitutionality since its enactment 125 years ago. Opposition to this proposition primarily has come from the logic that courts "hesitate to read out of § 371 the language that has been the foundation of so many convictions". United States v. Reynolds, 919 F.2d. 435 at 438 (1990). Let us not forget that the ratification process of the Constitution of the United States was completed on June 21, 1788, 204 years ago and ratification of the Bill of Rights was completed on December 15, 1791, 200 years ago.

> "- - - the loosely-defined concept of fraud makes conspiracy `to defraud the United States' peculiarly attractive to the prosecutor and particularly subversive of principles deeply rooted in our criminal law". Goldstein, supra, at 440.

III Conclusion

The defraud clause of the conspiracy law of the United States (18 U.S.C. § 37) violates the most basic concept of Due Process guaranteed by the fundamental law of this nation included in the Fifth Amendment to the Constitution of the United States.

IV ARGUMENT

THE FAILURE OF THE GOVERNMENT TO INCLUDE IN COUNT ONE OF THE INDICTMENT ALLEGING A VIOLATION OF 18 U.S.C. § 371, CONSPIRACY TO DEFRAUD THE IRS, A REFERENCE TO 18 U.S.C. § 1956, THE MONEY LAUNDERING STATUTE, OF WHICH PETITIONERS WERE ACCUSED BY THE GOVERNMENT 35 TIMES DURING ITS OPENING STATEMENT AND 23 TIMES DURING ITS CLOSING STATEMENT, IS CAUSE FOR REVERSAL OF PETITIONERS' CONVICTIONS AS BEING IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Although Count One of the indictment specifically refers to 18 U.S.C. § 371, a conspiracy:

> "to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the [IRS], in the ascertainment, computation, and collection of income taxes, owed by Salvatore M. Caruana",

the government, relying on an incorrect interpretation in the opinion of United States v. Tarvers, 833 F.2d 1068 (1st Cir. 1987) of United States v. Browning, 723 F.2d 1544 (11th Cir. 1984), described Count One as being a conspiracy to launder money. A total of fifty eight (58) times during opening and closing statements the government used the term "money laundering", or variations thereof, to describe the object of the conspiracy. Although 18 U.S.C. § 1956 prohibited money laundering as of October 27, 1986, money laundering was a crime during the term of

the conspiracy and most definitely during the trial. The jury doesn't function in a vacuum. The members of the jury knew it was a crime. The government chose to proceed against petitioners under the defraud clause 18 U.S.C. § 371 rather than the offense clause which clouded the issues presented to the jury as referred to in other arguments in this petition.

When the criminality of a conspiracy consists of an unlawful agreement of two or more persons to promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment. Pettibone v. United States, 148 U.S. 197, 13 S.Ct. 542, 37 L.Ed. 419 (1893), United States v. Olmstead, 5 F.2d 712 (1925), Hedderly v. United States, 193 F. 561 (1912), United States v. Cawthon, 125 F.Supp. 419 (1954).

The indictment in the case at bar

completely ignored any reference to its linchpin, the money laundering statute, 18 U.S.C. § 1956.

The Fifth Amendment provides that

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . "

Rule 6(f) of the Federal Rules of Criminal Procedure, provides that

> "An indictment may be found only upon the concurrence of 12 of more jurors."

The Count One of the indictment which the Grand Jury found in the case at bar, was not the same Count One which the government argued before the petit jury.

The Grand Jury did not hear any reference to 18 U.S.C. § 1956 and it didn't return an indictment with any reference to 18 U.S.C. § 1956, but the jury before whom petitioners were tried was bombarded with references to 18 U.S.C. § 1956, the money laundering statute.

The Grand Jury heard the accusations contained in only one prong of the two prong conspiracy indictment, i.e. tax motivation, which the government failed to show by direct evidence during the trial. But the jury at the trial heard the other prong, i.e. money laundering. See United States v. Browning, supra at 1546, and United States v. Pritchett, supra at 821, 822.

By prosecuting under the defraud clause of 18 U.S.C. § 371, without mentioning 18 U.S.C. § 1956 in the indictment, the government has altered its theory of prosecution. In effect, a constructive amendment of the indictment has occurred at trial.

> "A constructive amendment `occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecution or court after the grand jury has passed on them.' United States v. Dunn, 758 F.2d 30, 35 (1st Cir. 1985) quoting Gaither

> v. United States, 413 F.2d 1061, 1071-72 (D.C. Cir. 1969). See also Sitrone v. United States, 361 U.S. 212, 217-19, 80 S.Ct. 270, 273-74, 4 L.Ed.2d 252 (1960). Such a constructive amendment, either by alteration of the words of the indictment, a jury instruction which modifies the charge, or the admission of evidence which modifies the offense, is prejudicial per se and reversible error. Dunn, 758 F.2d at 35. See also United States v. Mollica, 849 F.2d 723, 728-29 (2d Cir. 1988)." United States v. Maling, 737 F.Supp. 684 (D.Mass 1990).

Petitioners submit such a constructive amendment occurred at their trial in violation of the Fifth Amendment.

Moreover, the Sixth Amendment provides that

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . "

A codification of the informational requirement contained in the Sixth Amendment is found in F.R.Crim.P. 7(c)(1):

> "the indictment . . . shall state for each count the official or customary citation of the statute

> which the defendant is alleged to have violated."

The indictment must contain the elements of the offense charged which enables the defendant

> "to plead an acquittal or conviction in bar of future prosecutions for the same offense."

United States v. Serino, 835 F.2d 924, 929 (1st Cir. 1987) (quoting Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41L.Ed.2d 590 (1974). Specifically, the indictment or information must "set forth all the elements of the offense without uncertainty or ambiguity." Id.

> "When the state's entire prosecutional apparatus is poised against the criminal defendant, he or she must receive fair notice of the charges in order to be able to prepare a complete defense."

United States v. Allard, 864 F.2d 248, 250 (1st Cir. 1989).

The petitioners were completely surprised to hear the government describe,

in the opening statement, that petitioners were accused of conspiracy to commit money laundering. During the trial the term money laundering did not arise except at a bench conference when the trial judge specifically said, "I don't want to hear money laundering. I want to hear what he was charged with." Tr. 17-182,183.

Then, in final argument when another deluge of money laundering accusations were flung at the jury to describe Count One, petitioners had a final apprisal of what uncertainty and ambiguity concerning the "nature and cause of the accusation" meant: that the government was going to get a conviction no matter on what constitutional rights it trampled.

IV Conclusion

The jury which returned a guilty verdict against petitioners on Count One of this case did not hear the same case

which appears in the indictment presented by the Grand Jury, in violation of the Fifth and Sixth Amendments to the Constitution of the United States.

ULTIMATE CONCLUSION

It is respectfully submitted that this Court should allow the petition for writ of certiorari to the United States Court of Appeals for the First Circuit because of (1) the conflict between its decision entered in this case on February 14, 1992 and the decision rendered by the United States Court of Appeals for the Sixth Circuit in United States v. Minarik, supra, involving the use of the constitutionally vague "defraud clause" of 18 U.S.C. § 371; (2) the conflict between this Court of Appeals for the First Circuit decision and that rendered by the United States Court of Appeals for the

Eleventh Circuit in United States v. Pritchett, supra, involving the contrary attitude of the First Circuit toward the necessity of proving both prongs of the object of the conspiracy with which petitioners were accused; (3) the claim raised in Professor Abraham S. Goldstein's seminal law review article dealing with 18 U.S.C. § 371, Conspiracy to Defraud the United States, supra, at 442, that the "defraud clause", as interpreted by this Court, "is too vague to be understood by the man of `common intelligence'" and should be held unconstitutional as being in violation of the Due Process clause of the Fifth Amendment to the Constitution of the United States; and (4) the violation by the government of the Fifth Amendment to the Constitution of the United States by the constructive amendment of the indictment presented by the Grand Jury in

referring to "money laundering", 18 U.S.C. § 1956, before the petit jury and the violation by the government of the Sixth Amendment by failing to inform petitioners of the nature and cause of the accusations of "money laundering" in the indictment.

Petitioners submit that the aforementioned reasons are so special and of such importance that they ordain the Supreme Court of the United States to exercise its judicial discretion to grant this petition for writ of certiorari to the United States Court of Appeals For the First Circuit.

Respectfully Submitted,

Albert F. Cullen, Jr.
Counsel of Record
Cullen & Butters
One Beacon Street
Boston, MA 02108

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1690 United States,
Appellee,

v.

Edmund M. Hurley,
Defendant, Appellant

No. 90-1693 United States,
Appellee,

v.

Charles R. Burnett,
Defendant, Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Edward F. Harrington,
U.S. District Judge]

Before

Selya, Circuit Judge,
Coffin, Senior Circuit Judge,
and Cyr, Circuit Judge.

Albert F. Cullen, Jr. for appellants.
Robert L. Ullmann, Deputy Associate United States Attorney, with whom Wayne A. Budd, United States Attorney, and F. Dennis

Saylor, IV, Special Counsel to Assistant Attorney General were on brief for appellee.

February 14, 1992

Coffin, Senior Circuit Judge.

Appellants Hurley and Burnett were charged in a 15-count indictment with participating in a sophisticated scheme to launder more than $5 million in illicit drug proceeds through the use of offshore front companies. The district court granted their motions for judgment of acquittal on most of the charges, leaving the jury to consider only two counts against Hurley and three against Burnett. The Jury returned guilty verdicts solely on a charge of conspiracy to defraud the IRS in violation of 18 U.S.C. § 371. On appeal, each appellant

challenges his conviction on sufficiency and due process grounds. We affirm.

I. Background

We shall recount the intricate factual backdrop of this case relatively briefly at this point, leaving for later discussion those additional facts necessary for full disposition of defendants' claims. Consistent with our responsibility in reviewing convictions for sufficiency of the evidence, we consider the facts in the light most favorable to the government. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Maraj, 947 F.2d 520, 522 (1st Cir. 1991).

Hurley and Burnett are both lawyers who spent substantial periods of time working for Salvatore "Mike" Caruana, a highly successful drug smuggler who earned

millions of dollars from the unlawful importation and distribution of marijuana and hashish between 1978 and 1981. Caruana became a fugitive in March 1984, and still has not been apprehended. In 1987, however, federal agents executed search warrants at five locations in Massachusetts and Connecticut where Caruana had stored documents and computer files detailing investment activities associated with his drug profits. The records show that several Panamanian and Bahamian companies were set up in 1979 and 1980 for Caruana's use. None of the public records reveal Caruana's ownership.[1]

---

[1] All of the listed officers for the corporations were employees of a Bahamian law firm, Nottage, Miller and Johnson. Attorney Rubie Nottage and her husband Kendall W. Nottage, a Bahamian Cabinet Minister, are indicted co-conspirators and are fugitives.

The indictment alleged that, from at least early 1979 to 1987, first Hurley, and then Burnett, knowingly assisted Caruana in a money laundering scheme that allowed him to hide and profitably invest $5 million of his illegal earnings. Defendants and others accomplished this deception, according to the government, through the network of front companies set up in Panama and the Bahamas, which made loans and investments in unusual ways, such as through the transfer of large amounts of cash. On two separate occasions in which defendants were involved, for example, Caruana transferred $100,000 in currency from briefcases to borrowers. In other transactions, after Caruana fled, checks drawn on Panamanian accounts were made out to the names of third parties for actual use and deposit by Caruana. The cash transactions allowed

Caruana to produce facially legitimate income from drug profits that were not originally reported, while the third-party checks enabled him to retrieve funds when necessary in a manner that concealed that he was the recipient of such income.

Hurley's legal work for Caruana began in the late 1970s, and extended at least through the fall of 1982. After that time, he remained connected to Caruana primarily as a recipient of investment earnings that he forwarded to the Bahamas. Burnett first worked with Caruana in 1982 and continued to perform services for him until 1986. During this time, Caruana became a fugitive from justice, and Burnett maintained secret communications with him by means of a computer and code name.

A grand jury indicted Hurley, Burnett and five co-defendants, including Caruana,

in March 1989. All seven defendants were charged with conspiring to defraud the IRS in violation of 18 U.S.C. § 371. Defendants Hurley and Burnett also were charge with conspiracy to racketeer as well as the substantive crime of racketeering, 18 U.S.C. §1962(c), (d), and twelve counts of foreign travel in aid of racketeering, 18 U.S.C. § 1952. Trial began a year later for appellants and two co-defendants. Following presentation of the government's case, the court granted defendant's motions for judgment of acquittal, except for the conspiracy to defraud and racketeering conspiracy counts against both defendants, one Travel Act count against Burnett and two counts against a third defendant not a party to this appeal. The jury returned guilty verdicts only against Hurley and Burnett on the conspiracy to defraud charge.

On appeal, defendants make two arguments: first, they claim that the indictment was improperly vague because it broadly charged a conspiracy to defraud the IRS rather than alleging violations of specific IRS requirements and, second, they contend that the evidence was insufficient to prove a knowing agreement to deceive the IRS.

II. Defective Indictment

Hurley and Burnett were convicted under 18 U.S.C. § 371, which prohibits two distinct types of conspiracies: conspiracies to commit a specific offense against the United States and conspiracies to defraud the United States, or one of its agencies, "in any manner or for any purpose." Count 1 of the indictment charged defendants under the second, broader clause, alleging that they

conspired "to defraud the United States by impeding, impairing, obstructing and defeating the lawful functions of the [IRS] in the ascertainment, computation, and collection of income taxes owed by Salvatore M. Caruana."

Relying primarily on United States v. Minarik, 875 F.2d 1186 (6th Cir. 1989), defendants argue that Count 1 was defective in that it charged a generic conspiracy to defraud the United States rather than a conspiracy to commit a specific tax offense -- an error that they claim invalidates their convictions. In Minarik, the Sixth Circuit affirmed a district court's grant of judgment notwithstanding the verdict for two defendants whom it concluded had been charged improperly under the defraud clause. Among other things, the appeals court was concerned that the broad

"conspiracy to defraud" language of the indictment overstated the defendants' duty to disclose information to the IRS. See id. at 1195. The court thus held that, where the object of an alleged criminal agreement is covered by a specific criminal statute that "closely defin[es]" a citizen's duties, the government must prosecute under the "offense," not the "defraud," clause of § 371. See id. at 1194-96.

Appellants claim that, like the defendants in Minarik, they had no general responsibility to assist the IRS in its effort to collect taxes, and they therefore could be convicted under § 371 only if they violated a specific tax provision that would trigger the statute's offense clause. Prosecution and conviction on the non-specific conspiracy

to defraud charge, they argue, violated their due process rights.

For several reasons, we find this argument unpersuasive. First, Minarik's holding has been narrowly limited to the facts of the case, even by the circuit in which it was issued. See, e.g., United States v. Mohney, No. 90-1738, 1991 U.S. App. LEXIS 28031, at *5 (6th Cir. Nov. 27, 1991); ("Minarik . . . created a limited rule to remedy the particular concerns raised by the facts of that case."); United States v. Sturman, Nos. 90-3147, 3148, 3151, 3750, slip op. at 6-7 (6th Cir. Oct. 24, 1991); United States v. Bilzerian, 926 F.2d 1285, 1301 (2d Cir. 1991); United States v. Reynolds, 919 F.2d 435, 439 (7th Cir. 1990). These courts have recognized that the primary problem in Minarik was not that the government charged defendants under the defraud

clause, but that it repeatedly shifted its theory of the case and thus "used the defraud clause in a way that created great confusion about the conduct claimed to be illegal," Minarik, 875 F.2d at 1196. See Reynolds, 919 F.2d at 439; Bilzerian, 926 F.2d at 1301. In this case, there has been no such confusion; the government consistently has maintained that defendants sought to deceive the IRS through the money-laundering activities in which they participated.

Second, the facts in Minarik are distinguishable in a critical respect from this case. In Minarik, the conspiracy had a narrow object -- concealment of assets upon which the IRS was empowered to levy -- and arose from a single event (the sale of a house). This object was explicitly proscribed by a particular statute, 26 U.S.C. § 7206 (4). In this case, however,

the government alleges that defendants participated in a longstanding and wide-ranging scheme to deceive the IRS regarding the amount and source of Caruana's assets. We borrow the language of the Sixth Circuit, which distinguished a similar complex conspiracy from the circumstances present in Minarik, a case from its own circuit:

> This large conspiracy involved many events which were intended to make the IRS impotent. No provision of the Tax Code covers the totality and scope of the conspiracy. This was not a conspiracy to violate specific provisions of the Tax Code but one to prevent the IRS from ever being able to enforce the Code against the defendants. Only the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses.

Sturman, slip op. at 6.

Finally, we reject defendants' contention that, because money laundering was legal at the time they acted, they had

no duty to refrain from such conduct and could not be prosecuted for it under § 371's defraud clause. Our case law makes it clear that lawful activity may furnish the basis for a conviction under § 371, see United States v. Tarvers, 833 F.2d 1068, 1075 (1st Cir. 1987) ("The statute does not require that the means used to achieve the unlawful goal of the conspiracy be unlawful."). Moreover, we specifically have held that evidence of a defendant's knowing participation in laundering drug-derived profits will support a jury finding of conspiracy to impede the IRS in its collection of taxes. See id. at 1076; United States v. Cambara, 902 F.2d 144, 146-47 (1st. Cir. 1990). See also United States v. Browning, 723 F.2d 1544, 1549 (11th Cir. 1984) (defendant's knowing participation in money laundering scheme, combined with co-

conspirator's stated purpose to defraud IRS, supports defendant's conviction for "overall scheme" to impede IRS).

We further find unpersuasive defendants' asserted lack of "fair warning" that their "legal" conduct could be the basis for a criminal prosecution. The statutory prohibition against defrauding the government adequately put defendants on notice that a scheme designed to frustrate tax collection was prohibited. Unlike the situation in Minarik, defendants' notice was not obfuscated by a confusing prosecution.

Thus, so long as the record contains sufficient evidence for a jury to conclude beyond a reasonable doubt that defendants knowingly participated in laundering drug proceeds, inevitably hindering the IRS in its ability to collect Caruana's taxes, their convictions under § 371's defraud

clause are unassailable. We now turn to the sufficiency issue.

III. Sufficiency of the Evidence

To prove a conspiracy under U.S.C. 18 § 371, the government must furnish sufficient evidence of three essential elements: an agreement, the unlawful objective of the agreement, and an overt act in furtherance of the agreement. Cambara, 902 F.2d at 146. Defendants challenge the government's proof of the "unlawful objective" element. They claim the evidence concerning their work for Caruana does not demonstrate an unlawful intent to evade the tax laws, but shows only that they performed legitimate legal services for a client with substantial resources.[2]

---

[2] Defendants wisely refrain from challenging the sufficiency of the evidence on the other elements -- an agreement and overt act -- in light of
CONTINUED ON NEXT PAGE

We do not so view the record. Under well-established precedent, the government did not need to show direct evidence of tax motivation. See Glasser v. United States, 315 U.S. 60, 80 (1942) ("[P]articipation in a criminal conspriracy need not be proved by direct evidence."); United States v. Hilton, 894 F.2d 485, 487 (1st Cir. 1990) ("[T]he prosecution may prove its case by circumstantial evidence . . . ."); United States v. Nivica, 887 F.2d 1110, 1113 (1st Cir. 1989) ("In a fraud case, the governemnt need not produce proof of defendant's scienter in order to

---

CONTINUED FROM PREVIOUS PAGE
well-established precedent permitting the government to prove a tacit agreement circumstantially through evidence of joint actions, see, e.g., United States v. Rivera-Santiago, 872 F.2d 1073, 1079 (1st Cir. 1989), and the substantial record evidence of their collaborations with Caruana.

convict.").

If the government presented sufficient evidence to demonstrate that Hurley and Burnett knew their transactions for Caruana involved illegal drug proceeds, the jury would have had a circumstantial basis for inferring that defendants -- both sophisticated attorneys -- understood that Caruana was conducting business in an unorthodox manner in order to conceal his criminal conduct and avoid paying taxes on his profits. See United States v. Sanzo, 673 F.2d 64, 69 (2d Cir. 1982).[3] Such evidence additionally

---

[3] Sufficient evidence existed to permit the jury to conclude that Caruana had no genuine intent to disclose and pay taxes on his illegal earnings. Arnold Katz, one of Caruana's drug distributors, testified that he and Caruana discussed the procedure for "how to protect the money, how to get money back to the U.S., how to filter it out and then filter it back in without raising the attentions of the IRS and the Government." [Tr. 6:36] Morover, despite his submission of letters

CONTINUED ON NEXT PAGE

would permit the jury to find that, in performing the legal work necessary to hide Caruana's drug-derived income from the governemnt, defendants were willing participants in the tax evasion scheme. This would be enough to support their convictions for conspiracy to impede the IRS under § 371. See Tarvers, 833 F.2d at 1075.

We believe that the record contains adequate evidence that Hurley and Burnett knew the source of Caruana's wealth. We consider each defendant in turn.

Hurley. The government argues that the record contains both direct evidence

---

CONTINUED FROM PREVIOUS PAGE
to the IRS saying that he would "conform to his tax-related obligations whenever that conformity does not waive or is not inconsistent with this Fifth Amendment right," he failed to reveal even the amount of his income or to pay any taxes throughout the time of the charged conspiracy.

of Hurley's knowledge of Caruana's drug dealing, in the form of testimony from witness Katz,[4] and circumstantial evidence arising from Hurley's ongoing involvement in Caruana's money laundering transactions.

Katz testified that, upon Caruana's recommendation, he met with Hurley in early 1980 and told the lawyer that he was seeking ways to "legitimize" money he had earned from "doing the deals" with Caruana. Later that year, at Caruana's home, Hurley explained to Katz, at Caruana's request, the "technical" aspects of setting up offshore companies "to filter money into them." Following that discussion, Caruana

---

[4] Katz was arrested in 1981 and eventually agreed to cooperate with the government in exchange for a reduction of his sentence to time served. A key witness for the government at defendants' trial, Katz spent approximately five and one-half months in jail.

gave Hurley a paper bag containing $25,000 in cash to cover the expenses incurred in setting up a corporation for Katz, telling Hurley that the money came "from Frank's load" -- a reference to another drug dealer.

This evidence on its own strongly suggests Hurley's awareness of Caruana's drug dealing. Complementing this is evidence of Hurley's participation in a series of unconventional business transactions. We describe several of these, emphasizing that they do not exhaust the list.

Early in the relationship between the two men, Hurley was involved in a transaction in which Caruana gave a convicted drug trafficker $100,000 in cash in exchange for a one percent interest in

a Michigan oil and gas lease.[5] Over a seven-year period, Hurley received monthly royalty checks resulting from that deal that he forwarded to the Bahamas for deposit in one of the front company accounts. In June 1979, Hurley witnessed in his office the signing of a $250,000 promissory note in favor of another Caruana trust. Following the signing, Hurley, Caruana and the borrower went to Caruana's home where Caruana gave the

---

[5] The testimony of Peter Krutschewski, the recipient of the cash, fluctuated in describing Hurley's role. At one point, he stated that he believed that Hurley may have been present when the money was transferred, see Tr. 19-14. He later testified, however, that "[Hurley] wasn't privy to when the money transpired[sic]," but he thought that Hurley was "in the area," id. at 55. Krustchewski's grand jury testimony, which was read at trial, included the following statements: "He was at the meeting, he was in the office. Whether he was present when the $100,000 was passed or given to me in the briefcase, I'm not sure." Id. at 54-55.

borrower approximately $100,00 in currency out of a briefcase brought into the room by two men who also had been carrying suitcases.

The government emphasizes Hurley's role in a venture involving Bay State Gold & Silver Exchange, Inc. a Plymouth, Massachusetts company that in the summer of 1980 was newly created business. In late July or early August, approximately one month after evidence showed that the Bahamian Cabinet minister brought $1 million of Caruana's currency to the Bahamas, Bay State Gold borrowed $800,00 from one of Caruana's Bahamian companies. The purported security for the loan was stock of the as yet unincorporated Bay State Gold. Hurley helped to arrange the loan and incorporated Bay State Gold

several weeks after the $800,00 had been wired to the company's account.[6]

Hurley makes much of the fact that the transactions in which he participated were not "shams," in that they generally involved valid deals with third parties entirely outside of Caruana's criminal enterprises and were accompanied by proper documentation. The legitimacy of each transaction, on its own, is not the issue

---

[6] Defense counsel asserted at argument that the evidence showed that Hurley had been involved only in the incorporation of Bay State Gold and not in the questionable loan transaction. Our reading of the transcript, however, does not lead us to so clearly partition Hurley's role. Richard Binder, the owner of bay State Gold, testified that at one meeting with Hurley he discussed incorporating his business and at another meeting he discussed "pledging the stock of the corporation for the loan." Tr. 8-160. Although Binder testified that the incorporation meeting occurred first, the documents show that the loan proceeds were received before the business was incorporated. See Exs. 13.3-13.7.

before us, however; the question is whether Hurley understood that these facially proper undertakings were part of a scheme to insulate Caruana and his money from the government.

In our view, a reasonable jury could have found that Hurley's repeated involvement in such deals over an extended period of time, sometimes with Caruana physically present for transactions, suggested that he knew of, and was hired to assist in, Caruana's effort to mask drug proceeds. We note, moreover, that Hurley and Caruana had more than a formal business affiliation. Early in the conspiracy period, Hurley lived for several months in one of the houses in Caruana's compound in Massachusetts. At that time, Caruana was actively engaged in drug dealing and had no apparent other source of income. When the series of

business transactions is viewed against the backdrop of Katz's testimony and Hurley's sustained proximity to Caruana, we are constrained to conclude that the jury permissibly inferred his knowing participation in conspiracy.

Burnett. The evidence pointing to Burnett's awareness of Caruana's drug dealing was not as explicit as that involving Hurley, undoubtedly because Burnett's involvement with Caruana did not begin until after the drug ventures had ended. Nevertheless, the circumstantial evidence made the inference of his knowledge equally permissible.

Perhaps the most telling fact regarding Burnett's knowledge was that two weeks before Caruana's scheduled trial on marijuana importation charges in 1984, and just before Caruana fled, Burnett visited him in Boston. After Caruana became a

fugitive, Burnett remained in close contact with, and continued to transact business for, Caruana. The two men communicated by computer, using a code name to refer to Caruana. It is also of note that Burnett, like Hurley, appeared to share a personal as well as professional relationship with Caruana. In 1983, Burnett flew with Caruana to the Bahamas to gamble.[7]

Defendants correctly point out that these contacts furnish no direct proof of Burnett's knowledge of Caruana's illicit business. The jury was permitted to

---

7 The record also contains evidence that Burnett attended proceedings of a Bahamian Commission of Inquiry investigating drug smuggling and public corruption on the island, and that he later received a copy of the Commission's report. Caruana's activities were among those being probed. Although the record fails to reflect the precise date of his attendance, it would have been sometime in 1984 or early 1985.

infer, however, that at least when Caruana fled to avoid trial on drug charges in 1984, Burnett must have realized that his client was a drug distributor and that his financial dealings were not simply idiosyncratic, but arose from a scheme to conceal illegal conduct and profits.

This inference of knowledge is clearly reasonable when viewed in light of the lengthy history of transactions on which Burnett worked, both before and after Caruana became a fugitive. Again, as with Hurley's endeavors, we make no attempt to be exhaustive in describing Burnett's activities.

The association between the two men began in 1982 when Burnett took part in Caruana's purchases of property in Florida through a realty trust and with a straw

buyer.[8] In 1983, Burnett approved a transaction involving the realty trust that produced $150,00 in cash for Caruana. In late 1984, Caruana instructed Burnett, by computer, to wire him $31,000 from an individual in Panama in the form of five cashier checks made payable to the third party. A short time later, a Florida bank issued five such checks, totaling $30,000; receipts for three of them were found among Caruana's seized records. The record further showed that, in 1985, Rubie Nottage sent all of Caruana's money laundering records to Burnett. The records ultimately were forwarded to Caruana in Connecticut and subsequently were seized by the government.

---

8 The straw, James Burke, testified that he subsequently found out that the title actually was in Burnett's name as trustee, with Burke as the beneficiary. [Tr. 19-130]

A transaction in early 1986, in which a Caruana front company obtained insurance proceeds from the crash of a Bar Harbor Airways plane, is particularly revealing of illicit motive. Bar Harbor had borrowed funds from a Bahamian company named Neon Tetra, which was under scrutiny at the time of the plane crash as a result of a probe into Caruana's drug smuggling activities. Evidently to avoid raising further suspicions about the Bahamian Neon Tetra, a different corporation named Neon Tetra Investments, Ltd. S.A. was formed in Panama on February 18, 1986.[9] It was

---

[9] The government provided us with no record evidence of the date of incorporation for the new Neon Tetra. Defendants, however, acknowledge formation of a "successor" Neon tetra in Panama. The fact that this company was formed in haste is borne out in the misspelling of the company name on the corporate seal that appears on the signed form releasing Bar Harbor from the loan. See Ex. 11.18.

in Burnett's office, two days later, that Bar Harbor signed over the insurance proceeds to a Panamanian attorney in exchange for a release from this new Neon Tetra. Later that year, a Panamanian bank issued 50 checks in the amount of $7,500 each, made payable to Serge DeConinck, a past boyfriend of a woman who knew and worked with Burnett. Caruana deposited 31 of these checks in a Connecticut bank account.

As with Hurley, we emphasize that evidence of Burnett's involvement in any single deal might not have provided a sufficient basis for his conviction. It is the confluence of factors -- the duration of Burnett's association with Caruana, the routinely odd transactions and, most significantly, Burnett's visit on the eve of Caruana's drug trial followed by the secretive communication --

that permitted the jury to conclude that Burnett was fully aware of, and a full participant in, the underlying fraudulent scheme. See United States v. Nivica, 887 F.2d 1110, 1114 (1st Cir. 1989) ("[D]efendant's involvement in the operations of the enterprise was so pervasive that his knowledge of its illegal nature became reasonably certain."); United States v. Fusaro, 708 F.2d 17, 21 (1st Cir. 1983) (in prosecution for conspiracy to defraud FDIC under § 371, "[attorney's] participation in so many aspects of the scheme as well as his attempts to cover up the scheme . . . provides the basis for the inference that he acted with the requisite intent and knowledge").

Having concluded that the evidence recited above was sufficient to support the jury's verdicts, we necessarily reject

defendants' claims that this case in materially distinguishable from three earlier First Circuit cases, relied upon by the government, in which defendants were convicted under § 371 for conspiracy to defraud the IRS based on schemes to launder drug money. See Cambra, 902 F.2d at 144; United States v. Lizotte, 856 F.2d 341 (1st Cir. 1988); Tarvers, 833 F.2d at 1068.[10] Nor are defendants helped by the

---

10 Defendants assert four points of distinction that they claim require us to reverse their convictions: (1) they neither participated in the drug trafficking nor knew the drug source of the money they handled; (2) none of the conspirators explicitly stated a motive to defraud the IRS; (3) they did not structure transaction to evade reporting requirements, and (4) they did not falsify records or engage in sham transactions. Our discussion above fully disposes of three of these points. With respect to point three, we note only that defendants' failure specifically to evade IRS reporting requirements for the deals they consummated does not prevent those transactions form serving as the basis for a broader charge of fraud against the IRS.

cases they cite in which courts have invalidated convictions under § 371. We note, in particular, United States v. Krasovich, 819 F.2d 253 (9th Cir. 1987), in which defendant's conviction for conspiring to defraud the IRS was based entirely on his having registered a truck in his own name with knowledge that the true owner was involved in drug dealing. Reversing the conviction, the Ninth Circuit held that "there was no evidence, direct or circumstantial, . . . [that defendant] intended or agreed with any one else to impede the Internal Revenue Service in its collection of taxes," id. at 254. Had the record in this case contained only evidence of a single episode such as this, the jury's verdict might have been impeachable. Such is not the record here.

Accordingly, the judgments of conviction on Count 1 are AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1690 United States,
Appellee,

v.

Edmund M. Hurley,
Defendant, Appellant

No. 90-1693 United States,
Appellee,

v.

Charles R. Burnett,
Defendant, Appellant

BEFORE

SELYA, Circuit Judge,
COFFIN, Senior Circuit Judge,
CYR, Circuit Judge.

ORDER OF COURT

Entered March 11, 1992

Upon consideration of appellant's petition for rehearing, It is ordered that the petition for rehearing be denied.

By the Court:

FRANCIS P. SCIGLIANO,
Clerk

By: DANIEL P. LOUGHRY
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1690 United States,
Appellee,

v.

Edmund M. Hurley,
Defendant, Appellant

No. 90-1693 United States,
Appellee,

v.

Charles R. Burnett,
Defendant, Appellant

ORDER OF THE COURT

Entered March 19, 1992

Upon consideration of appellants' motion to stay mandate, It is ordered that the motion to stay mandate in the above captioned cases be denied.

By the Court:

FRANCIS P. SCIGLIANO

Clerk.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1690 United States,
Appellee,

v.

Edmund M. Hurley,
Defendant, Appellant

No. 90-1693 United States,
Appellee,

v.

Charles R. Burnett,
Defendant, Appellant

ORDER OF THE COURT

Entered April 17, 1992

Upon consideration of appellants' motion to recall mandate in the above captioned cases, It is ordered that the motion to recall mandate be denied.

By the Court:

FRANCIS P. SCIGLIANO

Clerk.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

Articles in addition to, and Amendment of, the Constitution of the United States of America

Article [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, where in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived or life, liberty , or property, without the process of law; nor shall private property be taken for public use without just compensation.

Article [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defence.

18 U.S.C. §371
Conspiracy to Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of

the conspiracy, each shall be fined not more that $10,000 or imprisoned not more that five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. §1956
Laundering of Monetary Instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity-

(A)(i) with the intent to promote the carrying on of specified

unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code; or

(B) knowing that the transaction is designed in whole or in part-

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

Shall be sentenced to a fine of not more that $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or

transfers, or attempts to transport, transmit or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to place in the United States from or through a place outside the United States-

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation represent the proceeds of some form of unlawful activity and knowing that such transportation is designed in whole or in part-

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of $500,000 or twice the value of the monetary instrument or funds involved in the transportation, whichever is greater, or imprisonment for not more that twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or action indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent-

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the

nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State and Federal law, conducts or attempts to conduct a financial transaction involving property represented by a law enforcement officer to be the proceeds of specified unlawful activity, shall be fined under this title or imprisoned for not more that 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official

authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1), or a transportation described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of-

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $10,000.

(c) As used in this section-

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the

transaction represented proceeds from some form, though not necessarily which form, or activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any

stock, bond certificate of deposit, or other monetary instrument, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or

currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer from or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given that term in section 5312(a)(2) of title 31, United States Code, and the regulations promulgated thereunder;

(7) the term "specified unlawful activity" means-

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined in section 408 of the Controlled Substances Act);

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating

to commissions or gifts for procuring loans), any sections of 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit,

and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies) section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 875 (relating to interstate communications), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to fraudulent Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from

conservator, receiver, or liquidating agent of financial institution), section 1201 (relating to kidnapping), section 1203 (relating to hostage taking), section 1341 (relating to wire fraud) affecting a financial institution, section 1344 (relating to bank fraud), section 2113 or 2114 (relating to bank and postal robbery and theft), or section 2319 (relating to copyright infringement) of this title, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930

(19 U.S.C. 1590) (relating to aviation smuggling), section 1822 of the mail Order Drug Paraphernalia Control Act (100 Stat. 3207-51; 21 U.S.C. 857) (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, or section 16 (relating to offenses and punishment) of the trading with the Enemy Act; or

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.),

the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties of affording civil remedies in addition to those provided fro in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney

General may direct, and by such components of the Department of Treasury as the Secretary of treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement

Investigation Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if-

(1) the conduct is by united States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

Federal Rules of Criminal Procedure 6(f) Finding and Return of Indictment

An indictment may be found only upon the occurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a federal magistrate in open court. If a complaint or information is pending

against the defendant and 12 jurors do not concur in finding an indictment, the foreman shall so report to a federal magistrate in writing forthwith.

Federal Rules of Criminal Procedure
7(c)(1)
The Indictment and the Information

(c) Nature and Contents.

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count . It may be alleged in a single count that the means by which the defendant committed the

offense are unknown or that the he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is allege therein to have violated.

Supreme Court, U.S.
FILED
JUL 8 1992
OFFICE OF THE CLERK

(2)

No. 91-1817

In the Supreme Court of the United States

OCTOBER TERM, 1992

EDMUND M. HURLEY AND CHARLES R. BURNETT,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
GAIL BRODFUEHRER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the decision in this case conflicts with *United States* v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989).

2. Whether the decision in this case conflicts with *United States* v. *Pritchett*, 908 F.2d 816 (11th Cir. 1990).

3. Whether the "defraud" clause of 18 U.S.C. 371 is unconstitutionally vague.

4. Whether the prosecution's use of the term "money laundering" during opening statement and closing argument constituted an unconstitutional constructive amendment of the indictment.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Braverman v. *United States*, 317 U.S. 49 (1942)	14
Dennis v. *United States*, 384 U.S. 855 (1966)	8, 13
Glasser v. *United States*, 315 U.S. 60 (1942)	8
Hammerschmidt v. *United States*, 265 U.S. 182 (1924)	13
Ingram v. *United States*, 360 U.S. 672 (1959)	12
Stirone v. *United States*, 361 U.S. 212 (1960)	14
Tanner v. *United States*, 483 U.S. 107 (1987)	9, 13
United States v. *Bilzerian*, 926 F.2d 1285 (2d Cir.), cert. denied, 112 S. Ct. 63 (1991)	5, 11
United States v. *Cambara*, 902 F.2d 144 (1st Cir. 1990)	7
United States v. *Davis*, 679 F.2d 845 (11th Cir. 1982), cert. denied, 459 U.S. 1207 (1983)	14
United States v. *Dunn*, 758 F.2d 30 (1st Cir. 1985)	14
United States v. *Hathaway*, 798 F.2d 902 (6th Cir. 1986)	14
United States v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989)	5, 8, 9, 10
United States v. *Mohney*, 949 F.2d 899 (6th Cir. 1991)	5, 10, 11
United States v. *Mollica*, 849 F.2d 723 (2d Cir. 1988)	14
United States v. *Pritchett*, 908 F.2d 816 (11th Cir. 1990).	12
United States v. *Reynolds*, 919 F.2d 435 (7th Cir. 1990), cert. denied, 111 S. Ct. 1402 (1991)	5-6, 11
United States v. *Somers*, 496 F.2d 723 (3d Cir.), cert. denied, 419 U.S. 832 (1974)	14

Cases—Continued: Page

United States v. *Sturman*, 951 F.2d 1466 (6th Cir. 1991), cert. denied, Nos. 91-1367, 91-1533, & 91-1596 (June 15, 1992) 5, 6, 10, 11, 12
United States v. *Tarvers*, 833 F.2d 1068 (1st Cir. 1987) ... 7
United States v. *Von Stoll*, 726 F.2d 584 (9th Cir. 1984) . 14
Yates v. *United States*, 354 U.S. 298 (1957) 14

Constitution and statutes:

U.S. Const.:
Amend. V (Due Process Clause) 13, 14
Amend. VI 14
Money Laundering Control Act of 1986, Pub. L. No. 99-5709, Tit. XVIII, § 1352(a), 100 Stat. 3207-18 9
Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.*:
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
Travel Act, 18 U.S.C. 1952(a)(1) 2
18 U.S.C. 371 ..... 2, 5, 6, 8, 9, 13
18 U.S.C. 1956 ..... 8, 9, 11
26 U.S.C. 7206(4) 10

Miscellaneous:

Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405 (1959) 9

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1817

EDMUND M. HURLEY AND CHARLES R. BURNETT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A35) is reported at 957 F.2d 1.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1992. A petition for rehearing was denied on March 11, 1992. Pet. App. A36. The petition for a writ of certiorari was filed on May 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners and five co-defendants were charged in a 15-count indictment with conspiracy to defraud the United States by impeding, impairing, obstructing, and defeating the lawful functions of the Internal Revenue Service in the ascertainment, computation, and collection of income taxes owed by Salvatore M. Caruana, in violation of 18 U.S.C. 371 (Count 1); conspiracy to engage in racketeering, in violation of 18 U.S.C. 1962(d) (Count 2); racketeering, in violation of 18 U.S.C. 1962(c) (Count 3); and use of foreign facilities in aid of racketeering, in violation of the Travel Act, 18 U.S.C. 1952(a)(1) (Counts 4-15). Gov't C.A. Br. 1; Pet. App. A2. At the close of the government's case, the district court granted petitioners' motions for a judgment of acquittal on all counts except the conspiracy to defraud count as it related to both petitioners, the racketeering conspiracy count as it related to petitioner Hurley, and one Travel Act count against petitioner Burnett (Count 14). Pet. App. A7; Gov't C.A. Br. 1. On April 19, 1990, the jury returned a guilty verdict against petitioners on Count 1 and acquitted them on the remaining counts. Pet. App. A2, A7.

On July 9, 1990, petitioner Hurley was sentenced to serve 8 months in prison and 16 months on probation, and petitioner Burnett was sentenced to serve 6 months in prison and 12 months on probation. In addition, each petitioner was fined $10,000. Gov't C.A. Br. 2.

2. Both petitioners are lawyers who spent a considerable amount of time working for co-defendant Salvatore "Mike" Caruana, a drug smuggler who earned millions of dollars from the unlawful importation and distribution of marijuana and hashish

between 1978 and 1981. Pet. App. A3-A4. Caruana has been a fugitive since March 1984. Pet. App. A4.

Petitioners helped Caruana hide $5 million of his illegal earnings through a network of Panamanian and Bahamian companies, which made loans and investments in unusual ways, including the transfer of large amounts of cash. Pet. App. A5. For example, on two separate occasions involving Hurley, Caruana transferred $100,000 in currency from briefcases to borrowers. *Ibid.* After Caruana fled, Burnett helped arrange for checks drawn on Panamanian accounts to be made out to the names of third parties, although the checks were actually for Caruana's use. *Ibid.* The cash transactions created the appearance that Caruana had legitimate income, and the third-party checks enabled Caruana to receive funds in a manner that concealed that he was the recipient. Pet. App. A6.

Petitioner Hurley provided legal services to Caruana from the late 1970s through at least the fall of 1982. Those services included participating in the two $100,000 cash transactions and investing the narcotics proceeds in a purportedly legitimate precious metals firm in Massachusetts. Pet. App. A21-A24. After 1982, Hurley continued his involvement with Caruana by receiving checks for investment earnings that Hurley then forwarded to the Bahamas. Moreover, Caruana and Hurley had more than a formal business relationship. During the conspiracy, when Caruana was actively engaged in drug dealing and had no other apparent source of income, Hurley lived for several months in a house on Caruana's compound in Massachusetts. Pet. App. A25; Gov't C.A. Br. 4.

Arnold Katz, one of Caruana's drug distributors, testified that, on Caruana's recommendation, he met with Hurley in early 1980 and told him that he was

looking for ways to "legitimize" money he had earned "doing the deals" with Caruana. Later that year, in Caruana's home, Hurley complied with Caruana's request to explain to Katz the "technical" aspects of setting up offshore companies "to filter money into them." Pet. App. A20. After that discussion, Caruana gave Hurley a paper bag containing $25,000 in cash to pay the expenses of setting up a corporation for Katz; Caruana told Hurley that the money came from another drug dealer's "load." Pet. App. A21.

Petitioner Burnett worked for Caruana from 1982 until 1986. In 1984, Burnett visited Caruana in Boston, just two weeks before Caruana was scheduled to go to trial on marijuana importation charges. Pet. App. A26. After Caruana became a fugitive, Burnett used a computer and code name to maintain secret communications with him and continued to transact business for him. Pet. App. A6. During that time, Burnett arranged for the issuance of cashier's checks for Caruana's use, stored Caruana's money laundering records, and participated in a complex transaction to channel certain insurance proceeds through several third parties to Caruana. Pet. App. A29-A31. Although Burnett did not become involved with Caruana until after Caruana's drug ventures had ended, the transactions and contacts between Burnett and Caruana provided circumstantial evidence that Burnett was aware of the source of Caruana's wealth. See Pet. App. A28.

3. On appeal petitioners argued (1) that the indictment was defective because it charged a conspiracy to defraud the United States rather than a conspiracy to commit a specific tax offense, and (2) that the evidence was insufficient to prove that they entered an agreement to deceive the IRS.

In support of their first argument, petitioners relied primarily on *United States* v. *Minarik*, 875 F.2d 1186 (6th Cir. 1989). In *Minarik*, the court held that the government must prosecute under the "specific offense" clause, rather than under the "defraud" clause, of 18 U.S.C. 371 where the object of the conspiracy is described by a specific criminal statute that closely defines a citizen's duties. 875 F.2d at 1194-1196.[1] Petitioners argued that they had no general responsibility to assist the IRS in its effort to collect taxes and that their prosecution and conviction under the non-specific defraud clause therefore violated their due process rights. Pet. App. A10-A11.

The court of appeals rejected that argument. First, it observed that the Sixth Circuit has narrowly limited *Minarik* to the facts of that case and that other courts have declined to read *Minarik* expansively. Pet. App. A11, citing *United States* v. *Sturman*, 951 F.2d 1466, 1472-1474 (6th Cir. 1991), cert. denied, Nos. 91-1367, 91-1533, & 91-1596 (June 15, 1992); *United States* v. *Mohney*, 949 F.2d 899 (6th Cir. 1991); *United States* v. *Bilzerian*, 926 F.2d 1285, 1301 (2d Cir.), cert. denied, 112 S. Ct. 63 (1991); *United States* v. *Reynolds*,

---

[1] 18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

919 F.2d 435, 439 (7th Cir. 1990), cert. denied, 111 S. Ct. 1402 (1991). Adopting the reasoning of those decisions, the court concluded that the problem in *Minarik* was not that the defendant had been charged under the "defraud" clause but that the government had repeatedly shifted its theory of prosecution. Pet. App. A11-A12. The court found that there was no similar problem in this case because the government consistently had maintained that petitioners sought to deceive the IRS through the money laundering activities in which they participated. Pet. App. A12.

Second, the court of appeals determined that the facts in *Minarik* were distinguishable "in a critical respect." Pet. App. A12. In this case, the government charged and proved that petitioners participated in a complex and longstanding scheme to deceive the IRS regarding the amount and source of Caruana's income and assets; in *Minarik*, the conspiracy arose from a single event (the sale of a house) and had a narrow object—the concealment of assets upon which the IRS was empowered to levy. Pet. App. A12-A13. Quoting the Sixth Circuit's decision in *United States* v. *Sturman*, 951 F. 2d at 1473, the court of appeals characterized petitioners' conspiracy as "one to prevent the IRS from ever being able to enforce the [Internal Revenue] Code against the defendants" rather than a conspiracy to violate specific provisions of the Code. Pet. App. A13.

The court also rejected petitioners' contention that money laundering was legal at the time they acted, that they therefore had no duty to refrain from such conduct, and that they could not be prosecuted for that conduct under the defraud clause of Section 371. Pet. App. A13-A14. Noting that Section 371 does not require that the means used to achieve the unlawful goal of a conspiracy be unlawful, the court reiterated

its prior holdings in *United States* v. *Cambara*, 902 F.2d 144, 146-147 (1st Cir. 1990), and *United States* v. *Tarvers*, 833 F.2d 1068, 1075 (1st Cir. 1987), that evidence of a defendant's knowing participation in laundering drug-derived profits will support a jury finding of conspiracy to impede the IRS in its collection of taxes. Pet. App. A14.

The court also found unpersuasive petitioners' contention they did not have fair warning that their "legal" conduct could be the basis for a criminal prosecution. The court found that the statutory prohibition against defrauding the government gave petitioners adequate notice that a scheme to frustrate tax collection was unlawful. Pet. App. A15.

Finally, the court considered petitioners' argument that there was insufficient evidence to support the verdict. Pet. App. A16-A35. Petitioners argued that the evidence did not show an "unlawful objective." They claimed that the record demonstrated only that they performed legitimate legal services for a client who had substantial resources. Pet. App. A16. The court rejected petitioners' contention. It observed that the government need not show direct evidence of tax motivation, and it concluded that there was sufficient circumstantial evidence in the record from which the jury could infer that petitioners knew their transactions for Caruana involved illegal drug proceeds. Pet. App. A17-A18. Moreover, the court found that the jury could infer that petitioners, as sophisticated attorneys, understood that Caruana was conducting business in an unorthodox manner in order to conceal his criminal conduct and avoid paying taxes, and that petitioners became willing participants in the tax evasion scheme by performing legal services necessary to hide Caruana's drug-derived income from the government. Pet. App. A18-A19.

ARGUMENT

1. Petitioners contend (Pet. 18-29) that, instead of being charged with a conspiracy to defraud the United States, they should have been charged under the specific offense clause of Section 371 with a conspiracy to engage in money laundering in violation of 18 U.S.C. 1956. They assert that the decision of the court of appeals in this case is in conflict with the decision of the Sixth Circuit in *United States* v. *Minarik*, *supra*.

This Court has rejected the proposition that the "offense" and "defraud" clauses of Section 371 are mutually exclusive, *i.e.*, that a prosecution under the defraud clause is impermissible if the defendants conspired to commit a specific substantive offense. In *Dennis* v. *United States*, 384 U.S. 855, 862-864 (1966), the defendants were convicted of conspiring to defraud the United States by filing false affidavits with the National Labor Relations Board. They argued that the case involved "a conspiracy to commit the substantive offense of filing false statements in violation of 18 U.S.C. § 1001" and that their misconduct "may not properly be laid under the conspiracy-to-defraud clause of [Section] 371." *Id.* at 862-863. This Court held that "[t]he fact that the events [charged] include the filing of false statements does not, in and of itself, make the conspiracy-to-defraud clause of [Section] 371 unavailable to the prosecution." *Id.* at 863-864. See also *Glasser* v. *United States*, 315 U.S. 60, 67 (1942) (where indictment alleging conspiracy to defraud alleges breach of specific statute, that breach is treated as "a way of consummating the conspiracy and * * * like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense"). Recently, the Court reaffirmed that the defraud clause "reaches any conspiracy for the purpose

of impairing, obstructing or defeating the lawful function of any department of Government." *Tanner* v. *United States*, 483 U.S. 107, 128 (1987) (quotation omitted). Thus, decisions of this Court establish that the conspiracy in this case was properly charged under the defraud clause of Section 371.

We believe that *Minarik* was wrongly decided even on its own facts. The decision finds no support in the language of the statute; it conflicts with *Dennis* and *Tanner*; and its interpretation of the conspiracy statute is unworkable in practice. But even assuming that *Minarik* was correctly decided, it does not conflict with the First Circuit's decision in this case.

First, the Sixth Circuit in *Minarik* recognized that where, as here, a specific statute prohibiting the object of the defendants' conspiracy was not enacted until after the conspiracy began, the conspiracy may be charged under the defraud clause of Section 371. In the Sixth Circuit's words, "the 'defraud' portion of the statute should be viewed 'as an interim measure protecting the [g]overnment until such time as Congress has been able to deal more specifically with a given problem.' " 875 F.2d at 1194, citing Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L.J. 405, 450 (1959). The money laundering statute was enacted in October 1986 (Pub. L. No. 99-570, Tit. XVIII, § 1352(a), 100 Stat. 3207-18), while the indictment in this case alleged that the conspiracy began in October 1978. Thus, the conspiracy alleged in the indictment could not have been charged as a conspiracy to violate 18 U.S.C. 1956.

Second, *Minarik* itself, as it has been interpreted by the Sixth Circuit in subsequent cases and as it has been understood by other courts, is a narrow decision based on facts unlike the facts of this case. The facts in *Minarik*, which involved the concealment of assets

after a taxpayer had received assessment notices, fell squarely within the prohibition contained in 26 U.S.C. 7206(4) relating to post-assessment concealment. See 875 F.2d at 1187, 1194-1195. Although the government could have brought a charge of conspiracy to violate 26 U.S.C. 7206(4), it instead proceeded under the defraud clause and then changed its theory of the case several times without further specifying the charge. See 875 F.2d at 1187, 1190. Notwithstanding broader dicta in the opinion, the *Minarik* court's actual holding was very narrow: "[W]here the duties of a citizen are as technical and difficult to discern as they are when a taxpayer, before levy, engages in otherwise legitimate activities that may make ultimate collection more difficult, we hold that a Congressional statute closely defining those duties takes a conspiracy to avoid them out of the defraud clause and places it in the offense clause." *Id.* at 1196. The court took pains "to emphasize the limits of our holding." *Id.* at 1195-1196. See also *id.* at 1187 (holding that the offense and defraud clauses of the conspiracy statute were mutually exclusive "as applied to the facts of [that] case").

The narrow scope of *Minarik* is confirmed by subsequent Sixth Circuit decisions. In *United States* v. *Sturman*, 951 F.2d at 1473 n.1, the court noted the support for "limiting *Minarik* to its facts," and in *United States* v. *Mohney*, 949 F.2d at 903, the court agreed that "*Minarik*, * * * by its own language, as well as by implication, created a limited rule to remedy the particular concerns raised by the facts of that case." See also *id.* at 902 (referring to "[t]he *Minarik* court's intention to limit its holding to the particular facts of that case"). The Sixth Circuit has explained that the "chief concern" of *Minarik* "was that the government, by constantly changing the

prosecution theory, never adequately informed the defendant of the charges against him." *Sturman*, 951 F.2d at 1474; see *Mohney*, 949 F.2d at 903; see also *United States* v. *Bilzerian*, 926 F.2d at 1301; *United States* v. *Reynolds*, 919 F.2d at 439. In addition, the Sixth Circuit has ruled that the *Minarik* holding is pertinent only "when the conduct charged constitutes a conspiracy to violate one specific statute." *Mohney*, 949 F.2d at 904; see *Sturman*, 951 F.2d at 1473.

In contrast to *Minarik*, there was no confusion or ambiguity in the charges leveled against petitioner or in the government's conduct of the trial. As the court of appeals recognized, "the government consistently has maintained that defendants sought to deceive the IRS through the money-laundering activities in which they participated." Pet. App. A12. In addition, the object of the conspiracy in this case was not to violate a specific statute by means of a single act, but was instead to engage "in a long-standing and wide-ranging scheme to deceive the IRS regarding the amount and source of Caruana's assets." Pet. App. A13.[2] Accordingly, the facts of this case correspond not to those of *Minarik*, but to those of *Sturman* and *Mohney*, in which the Sixth Circuit upheld convictions for tax conspiracies under Section 371's defraud

---

[2] Many of the services petitioners provided to Caruana could not have been charged as money laundering. For example, establishment of the various Panamanian and Bahamian companies used to conceal income from the IRS did not involve "financial transactions" and therefore lacked an essential element of a money laundering violation. See 18 U.S.C. 1956. Similarly, Burnett's use of a secret code and computer to communicate with Caruana while he was a fugitive did not constitute a violation of the money laundering statute but certainly constituted activity designed to hide information from the IRS and thereby impair, impede, obstruct and defeat its lawful functions.

clause. As the Sixth Circuit held in *Sturman*, "[o]nly the defraud clause can adequately cover all the nuances of a conspiracy of the magnitude this case addresses." 951 F.2d at 1473.

2. Petitioners also maintain (Pet. 30-35) that the decision of the court of appeals conflicts with the decision of the Eleventh Circuit in *United States* v. *Pritchett*, 908 F.2d 816 (1990).

In *Pritchett*, the defendants, who had been involved in the concealment of the assets of their brother, a drug dealer, were convicted of conspiring to evade the brother's federal income taxes. 908 F.2d at 818. The Eleventh Circuit reversed the convictions on the ground that the government had failed to establish that the defendants knew that the object of the conspiracy was to enable their brother to avoid paying his taxes. Relying on *Ingram* v. *United States*, 360 U.S. 672 (1959), the court held that the efforts at concealment could reasonably be explained as based on motives other than to evade taxes, and that the government was therefore required to offer independent proof that the defendants had intended to assist the taxpayer in evading taxes. While the government presented evidence that the taxpayer had earned money from drug sales and had failed to file federal income tax returns, the court of appeals found nothing in the evidence indicating that the defendants knew he was not filing returns and did not intend to pay his federal income taxes. 908 F.2d at 820-821.

In contrast to *Pritchett*, there was ample independent evidence in this case from which the jury could have concluded that petitioners intended not merely to conceal assets from the IRS—as in *Pritchett*, see 908 F.2d at 821—but also to hide Caruana's income itself. As the court of appeals explained, Arnold Katz testified that he met with Hurley and informed him

that he was trying to "legitimize" the proceeds of drug dealing, and Hurley explained to Katz how to set up offshore companies "to filter money into them." Pet. App. A20. Although the evidence with respect to Burnett was more circumstantial, the jury could have concluded from the series of transactions in which Burnett produced cash for Caruana that Burnett "was fully aware of, and a full participant in, the underlying fraudulent scheme." Pet. App. A32. Moreover, unlike in *Pritchett*, petitioners were sophisticated lawyers and could well anticipate and understand the effect the services they provided to Caruana would have on the efforts of the IRS to ascertain Caruana's income and collect his taxes. Accordingly, the decision of the First Circuit does not conflict with *Pritchett*, and further review of petitioners' fact-bound claim that the evidence was insufficient to convict them is unwarranted.

3. Petitioners argue (Pet. 35-44) that the "defraud" clause of 18 U.S.C. 371 is so vague that it fails to give them fair warning of the criminal nature of their conduct and thus violates the Due Process Clause of the Fifth Amendment. It has long been settled, however, that the federal conspiracy statute, 18 U.S.C. 371, proscribes conspiracies aimed at impeding and impairing governmental functions through deceit, craft, or trickery. See *Tanner* v. *United States*, 483 U.S. at 128; *Dennis* v. *United States*, 384 U.S. at 860-861; *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924). As the court of appeals held (Pet. App. A15), "[t]he statutory prohibition against defrauding the government adequately put defendants on notice that a scheme designed to frustrate tax collection was prohibited."

While petitioners do not appear to contest the illegality of the stated object of the conspiracy—to

defraud the United States by impeding, impairing, obstructing, and defeating the IRS—they do complain that there was nothing illegal about any of the acts they committed in furtherance of that objective. But this Court has unequivocally held that the means used to accomplish a conspiracy need not be illegal in themselves. See, *e.g.*, *Yates* v. *United States*, 354 U.S. 298, 334 (1957); *Braverman* v. *United States*, 317 U.S. 49, 53 (1942) ("The overt act * * * need not be itself a crime."). Thus, as the court of appeals noted, "lawful activity may furnish the basis for a conviction under § 371." Pet. App. A14.

4. Finally, petitioners contend (Pet. 44-52) that repeated references to "money laundering" in the government's opening statement and closing argument constituted constructive amendment of the indictment, in violation of their rights under the Fifth and Sixth Amendments.

A constructive amendment of an indictment occurs if the indictment's charging terms are altered "by the presentation of evidence and jury instructions which so modify essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an offense other than that charged in the indictment." *United States* v. *Hathaway*, 798 F. 2d 902 (6th Cir. 1986); see also *Stirone* v. *United States*, 361 U.S. 212, 218-219 (1960); *United States* v. *Dunn*, 758 F.2d 30 (1st Cir. 1985); *United States* v. *Mollica*, 849 F.2d 723, 729 (2d Cir. 1988); *United States* v. *Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984); *United States* v. *Davis*, 679 F.2d 845, 851 (11th Cir. 1982), cert. denied, 459 U.S. 1207 (1983); *United States* v. *Somers*, 496 F.2d 723, 744 (3d Cir.), cert. denied, 419 U.S. 832 (1974).

There was no constructive amendment of the indictment in this case. The prosecutor used the

term "money laundering" as a short-hand reference to petitioners' attempt to defraud the United States by concealing assets and evading taxes, not as a reference to any particular offense with which petitioners were charged. The evidence introduced by the government was designed to and did show that petitioners were guilty of the conspiracy offense charged in the indictment. The jury was plainly instructed on the elements of that offense. Petitioners do not allege that those instructions were inadequate in any pertinent respect, nor do they advance any reason to believe that the jury was encouraged to or did disregard them. Accordingly, further review to consider petitioner's claim that the prosecutor should not have used the term "money laundering" in addressing the jury is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
GAIL BRODFUEHRER
Attorneys

JULY 1992